CHOONG MEE LENG

v.

LAM CHONG SENG

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ARIFIN JAKA JCA
[CIVIL APPEAL NO: W-02-650-2002]
1 JUNE 2005

CIVIL PROCEDURE: *Summary judgment - Specific performance - Application for summary judgment pursuant to action for specific performance in which plaintiff sought declaratory relief - Rules of the High Court 1980, O. 81 r. 1 - Whether High Court had jurisdiction and power to grant declaratory relief summarily under O. 81 r. 1 - Whether orders of High Court should be set aside*

CONTRACT: *Specific performance - Summary judgment, action for specific performance - Application for summary judgment pursuant to action for specific performance in which plaintiff sought declaratory relief - Rules of the High Court 1980, O. 81 r. 1 - Whether High Court had jurisdiction and power to grant declaratory relief summarily under O. 81 r. 1 - Whether orders of High Court should be set aside*

The plaintiff/purchaser brought an action against the defendant/vendor, claiming, *inter alia*, specific performance of an agreement for the purchase of a house from the defendant. Thereafter, the plaintiff took out a summons for summary judgment under O. 81 Rules of the High Court 1980 ('RHC'). The summons was dismissed by the registrar but, on appeal, the judge-in-chambers allowed it and entered judgment summarily for the plaintiff in terms of the various reliefs he sought, namely, a declaration, specific performance, damages and costs. Before the Court of Appeal herein, the sole issue that fell for determination was whether the judge-in-chambers lacked the jurisdiction to make the orders that he had made under O. 81 RHC.

Held (allowing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] A declaratory decree is not one of the remedies that may be granted summarily under O. 81 RHC. It followed, therefore, that the High Court did not have the power to make the orders that it had made in favour of the plaintiff. (pp 353 d-h & 354 a-b)

[Orders of High Court set aside; defendant granted unconditional leave to defend.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif/pembeli telah memulakan satu tindakan terhadap defendan/penjual di mana ianya menuntut, antara lain, perlaksanaan spesifik atas suatu kontrak untuk membeli sebuah rumah daripada defendan. Kemudiannya, plaintif telah mengeluarkan satu saman untuk memperolehi penghakiman terus di bawah A. 81 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Saman itu, bagaimanapun, telah ditolak oleh pendaftar yang mendengarnya, tetapi rayuan plaintif kepada hakim-dalam-kamar telah dibenarkan dan beliau memasukkan penghakiman terus untuk plaintif besertakan perintah-perintah deklarasi, perlaksanaan spesifik, gantirugi dan kos yang diminta oleh plaintif. Dalam rayuan semasa di hadapan Mahkamah Rayuan, persoalan tunggal yang berbangkit ialah sama ada hakim-dalam-kamar tersebut mempunyai bidangkuasa untuk mengeluarkan perintah-perintah yang dikeluarkannya itu.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Dekri deklarasi bukanlah merupakan salah satu daripada remedi yang boleh diberikan secara ringkas menerusi penghakiman terus dibawah A. 81 KMT. Oleh yang demikian, Mahkamah Tinggi, di dalam kes ini, memang tidak mempunyai kuasa untuk mengeluarkan perintah-perintah yang telah dikeluarkannya itu.

Perintah-perintah Mahkamah Tinggi diketepikan; defendan diberikan kebenaran membela.]

Case(s) referred to:
CE Heath plc v. Ceram Holding Co [1988] 1 WLR 1219 ***(foll)***
Cotra Enterprises Sdn Bhd v. Pakatan Mawar (M) Sdn Bhd [2001] 7 CLJ 261 HC ***(refd)***
Yong Mok Hin v. United Malay States Sugar Industries Ltd [1967] 2 MLJ 9 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 81 r. 1

For the defendant/appellant - SK Sivam; M/s PG Lim & Co
For the plaintiff/respondent - CS Lam (KC Chan with him); M/s CS Lam & Co

[Appeal from High Court, Kuala Lumpur; Writ Summons No: S6-22-283-2002]

Reported by Gan Peng Chiang

JUDGMENT

Gopal Sri Ram JCA:

This is a simple case. It merely involves a point of practice and procedure. It has to do with the propriety of the order for summary judgment entered by the learned judge of the High Court. We heard this appeal on 12 and 13 May and 2004 and at the conclusion of arguments allowed the appeal with costs here and below, set aside the High Court's orders and granted the appellant unconditional leave to defend. We also remitted the suit to the High Court to be mentioned before the judge in chambers on 31 May 2004 for the purpose of fixing a date for the grant of directions in case management, including the fixing of a date for the hearing and disposal of the action on its merits. The respondent has since applied for leave to appeal to the Federal Court and hence the necessity for this judgment. The narrative relevant to this case is as follows.

The respondent's case in the court below is that he had entered into a valid and binding contract with the appellant to purchase the latter's single storeyed link house which contract the appellant had refused to specifically implement. The respondent brought an action against the appellant to enforce the alleged agreement. At the foot of his writ he claimed a declaration, a decree of specific performance, damages and other relief. He then took out a summons for judgment under O. 81. The registrar before whom the summons came at first instance dismissed it. The respondent then appealed to the judge in chambers who allowed the appeal. The learned judge then proceeded to enter judgment summarily for a declaration, specific performance, damages, including exemplary damages and costs on a solicitor client basis. The appellant then appealed to us against the learned judge's order.

Before us the only point taken up and argued by both sides was whether the learned judge had jurisdiction under O. 81 to enter judgment in the terms he did. Now, O. 81 provides as follows:

> (1) In any action begun by writ indorsed with a claim:
>
> (a) for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages; or
>
> (b) for rescission of such an agreement; or
>
> (c) for the forfeiture or return of any deposit made under such an agreement,
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> the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment.
>
> (2) An application may be made against a defendant under this rule whether or not he has entered an appearance in the action.

It is not open to argument that the foregoing rule of court is jurisdictional in nature. But for the rule, the court has no jurisdiction to enter summary judgment in the cases set out therein. It is to be noticed that O. 81 does not include the declaratory decree among the relief that may be granted summarily. Compare this with the English RSC 1997 which empowers an English court to summarily grant a declaration that a contract is at an end. But neither the English rule of court nor ours empowers a court to include a declaration that a contract is subsisting. It follows that the court has no power to enter summary judgment either under procedure prescribed by O. 14 or O. 81 save in a case expressly provided for in either of these rules of court.

In *Cotra Enterprises Sdn Bhd v. Pakatan Mawar (M) Sdn Bhd* [2001] 7 CLJ 261, Ahmad Maarof JC had before him a case in which the plaintiff had sought summary judgment under O. 14 for a declaration the substance of which was that five written agreements he had entered into were void and had been rescinded. The learned judicial commissioner held – and in our judgment correctly held – that the declaration sought was in essence an order for rescission within O. 81 and therefore fell outside the scope of O. 14. In the present case the facts are inverted. Here the respondent obtained a declaration under O. 81 when that form of relief is not one of the remedies available summarily under the order. It is our very respectful view that the High Court was plainly wrong in making the order which it did as it simply did not have the power to do so.

In *C.E. Heath plc v. Ceram Holding Co* [1988] 1 WLR 1219, Neill LJ made the following observation:

> [T]he scope of Ord 14 proceedings has been a matter which has been determined by the rules. There would therefore appear to be little, if any, room for an argument that the court has some wider powers in these fields than that conferred by the rules, or that it has some residual or inherent jurisdiction to grant relief where it is just to do so, or that the wide language of the statute confers some additional powers to act outside and beyond the rules.

That passage in our respectful judgment applies to the summary procedure created by RHC O. 81.

When we put the jurisdictional point to learned counsel for the respondent when this appeal came up before us for argument on 12 May 2004, both Mr. Lam and Mr Chan said that they were taken by surprise as the matter had not been raised in the court below and asked for the matter to be adjourned to the next day to enable them to turn up the authorities. When the matter was called on for continued argument on 13 May 2004, neither Mr Lam nor Mr Chan was able to assist us in any way. We then proceeded to allow the appeal and to set aside the orders of the High Court. We also made the orders referred to in para. 1 of this judgment.

A word about costs. We were initially inclined to deprive the appellant of his costs. We thought that although it was open for the appellant to take the jurisdictional point at the appellate stage (see, *Yong Mok Hin v. United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9) the respondent had been placed at a distinct disadvantage because the point had been taken *ex improviso* without any notice having been given to counsel for the respondent. That is certainly the impression we gained from those representing the respondent. However, Mr K. Sivam of counsel for the appellant was able to demonstrate quite convincingly that the point had indeed been taken expressly in the appellant's written submission delivered in the court below pursuant to the learned judge's direction made on 2 July 2002. Accordingly we awarded the costs of the appeal and those incurred in the court below to the appellant. The deposit was ordered to be refunded to the appellant.